



ORIGINAL

BEFORE THE ARIZONA CORPORATE COMMISSION

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JEFF HATCH-MILLER
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MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

2006 MAY 10 A 11:35

AZ CORP COMMISSION
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IN THE MATTER OF THE FORMAL
COMPLAINT OF PAC-WEST TELECOMM
SEEKING ENFORCEMENT OF THE
INTERCONNECTION AGREEMENT
BETWEEN PAC-WEST TELECOMM AND
QWEST CORPORATION

) DOCKET NO. T-01051B-05-0495
) T-03693A-05-0495
)
)
) SUPPLEMENTAL BRIEF OF
) PAC-WEST TELECOMM
)
)

Introduction

The central issue in this case is whether Qwest Corporation ("Qwest") is required to compensate Pac-West Telecomm ("Pac-West") for ISP-bound traffic originated by Qwest customers and terminated by Pac-West. Qwest has withheld nearly 70 percent of Pac-West's invoices for more than two years, and forced Pac-West to engage in two separate litigations, to enforce the ISP contract amendment. Two decision makers, Arbitrator John Antonuk and Administrative Law Judge Amy Bjelland, have independently concluded that under the contract between the parties, Qwest owes Pac-West the withheld compensation. See Recommended Opinion and Order ("ROO") pp. 7-

8; Arbitration Decision, Exhibit C to Pac-West Complaint, p. 7. In a last-ditch effort to change this outcome, Qwest asks for permission to submit supplemental briefing on the First Circuit's decision in *Global NAPs v. Verizon New England*, ___ F.3d ___, 2006 WL 924035 (1st Cir. April 11, 2006) ("*Global NAPs*"). But the *Global NAPs* decision should not affect the outcome here, for three reasons.

First, Qwest misstates the holding in *Global NAPs*. The issue in that case was whether the FCC had, in its *ISP Remand Order*, explicitly preempted the state's authority to impose access charges for interexchange VNXX ISP-bound traffic. *Global NAPs* at 27.¹ The First Circuit held that the *ISP Remand Order* did not contain clear evidence preempting the state's authority, and thus the Massachusetts Department of Telecommunications and Energy could authorize access charges for all "VNXX" traffic, including ISP-bound traffic. *Id.* at 33-34. *Nowhere* in *Global NAPs* did the court address whether *Global NAPs* should be compensated for all locally-dialed ISP-bound traffic, as Qwest contends.

Second, Qwest's obligation to compensate Pac-West flows directly from the interconnection agreement ("ICA") between Pac-West and Qwest. As the ROO accurately explains, the contract between Qwest and Pac-West requires Qwest to compensate Pac-West for all ISP-Bound traffic originated by Qwest customers. The ROO accordingly directs Qwest to pay Pac-West *based on the language of the ICA*. It

¹ All page references to *Global NAPs* reflect the pagination used in the copy of *Global NAPs* appended to Qwest's Notice of Seventh Filing of Supplemental Authority filed in this docket on April 12, 2006.

follows that even if *Global NAPs* were the law in Arizona today (which it is not), the ICA between Pac-West and Qwest would still govern the parties' respective intercarrier compensation obligations.

Finally, *Global NAPs* is contrary to the *ISP Remand Order*, has no precedential force in Arizona, and should not be followed.

1. *Global NAPs* Has No Effect on the ROO

The Qwest Exceptions read *Global NAPs* for far more than it is worth. According to Qwest, *Global NAPs* is a "comprehensive and definitive decision that the *ISP Remand Order* applies *only* to traffic where the originating call and the ISP's modems/servers are physically located within the same LCA." (Qwest Exceptions at p. 4.) But nothing remotely resembling this assertion appears in the *Global NAPs* decision. Nowhere does *Global NAPs* even discuss compensation based on geographic location rather than the traditional NPA-NXX rating and routing. Instead, *Global NAPs* is about the breadth of FCC jurisdiction and federal preemption.

In *Global NAPs*, the First Circuit examined whether states were preempted specifically by the *ISP Remand Order* from excluding VNXX traffic from the compensation system ordered for ISP-bound traffic by the *ISP Remand Order*. Because VNXX traffic was not specifically mentioned in *ISP Remand Order*, the First Circuit concluded that the state was not barred from categorizing VNXX traffic. This holding is a far cry from a ruling on the appropriate categorization of VNXX traffic. Arizona could, consistent with *Global NAPs*, initiate a generic VNXX proceeding and conclude that the Telecommunications Act of 1996 recognizes only two types of traffic for purposes of

intercarrier compensation: (1) 251(g) (*i.e.*, “toll”) traffic that is subject to access charges, and (2) 251(b)(5) traffic for which carriers pay reciprocal compensation. Because the D.C. Circuit Court of Appeals has already concluded that, as a matter of law, ISP-bound traffic is not 251(g) traffic, *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433-34 (D.C. Cir. 2002), the compensation structure applicable to 251(b)(5) traffic must apply. In other words, the fact that the First Circuit concluded that the states were not preempted on this issue does not compel a particular outcome on the substantive issue itself.

Qwest suggests that the Administrative Law Judge did not review the *Global NAPs* decision before issuing her order. But the ROO is entirely consistent with *Global NAPs*. In *Global NAPs*, the First Circuit quoted from the FCC’s amicus curiae brief on the issue of VNXX compensation, noting that: “[t]he FCC itself has not addressed application of the *ISP Remand Order* to ISP-bound calls outside a local calling area’ or ‘decided the implications of using VNXX numbers for intercarrier compensation more generally.’” *Global NAPs* pp. 31-32. The First Circuit did not rebut, or identify any reason to doubt, the FCC’s assessment of the state of the law. The Administrative Law Judge agreed with the FCC, explaining that “the precise classification of VNXX traffic remains unsettled. Current jurisprudence at the federal level is inconclusive.” ROO at para. 18. The Administrative Law Judge went on to conclude that the plain language of this particular contract (the ICA and the ISP Amendment) provided for reciprocal compensation for *all* ISP-bound traffic, without exclusion. (Recommended Order and Opinion (“ROO”), paras. 21 & 24.) Because *Global NAPs* does not create new law that is relevant to the substantive claim asserted in this enforcement proceeding, and for the

reasons accurately set forth in Judge Bjelland's recommended order, the ROO should be adopted.

2. *Global NAPs* Does Not Impact the ICA Between Pac-West and Qwest

Qwest argues that the "clarity that *Global NAPs* brings to the contract interpretation issue" requires the Commission to reverse the Administrative Law Judge. Once again, nothing in the *Global NAPs* opinion supports this assertion. (If it were true, Qwest could file a change of law amendment to trigger a negotiation to amend the contract.) In fact, *Global NAPs* speaks not at all to the contract interpretation issue in this case. In this docket, the sole "contract interpretation issue" is the meaning of the ISP Amendment signed by Qwest on February 6, 2003. Two independent decision makers have concluded that, pursuant to the ISP Amendment, Qwest promised to pay Pac-West the state-ordered reciprocal compensation rate for "all" ISP-bound traffic. Belatedly, Qwest now claims that it did not know about VNXX traffic, and that the Pac-West business model was not disclosed to Qwest. However, two triers of fact have weighed the relative merits of Qwest's contractual claims and each has concluded that Qwest should be held to the terms of the contract amendment it signed in 2003. The applicable law and the evidence supports this conclusion.

Moreover, course of performance and public records from state Commission proceedings squarely refute Qwest's assertion that it did not know about VNXX traffic. Beginning in 2002, Qwest appeared as a party and participated in an Oregon docket on VNXX. *See Prehearing Conference Report* attached as Exhibit 1. As a party, Qwest received the Joint CLECs' Comments on Staff's Proposed Issues List filed with the

Oregon Commission. These comments, which were filed on December 4, 2002, included many questions about VNXX service, including “What is the appropriate compensation mechanism for VNXX service?” See Comments attached as Exhibit 2. This public docket establishes that, at least two months prior to signing the ISP Amendment, Qwest participated in a generic investigation into virtual NPA/NXX (VNXX). Two weeks after signing the Pac-West/Qwest ISP Amendment, Qwest filed testimony in this docket detailing its position on the permissibility and compensability on VNXX traffic. See Qwest’s Direct Testimony of Larry B. Brotherson, filed February 21, 2003 in Oregon Docket UM 1058 (VNXX).

Qwest’s assertion that *Global NAPs* brings clarity to this contractual dispute is unsupported. Likewise, Qwest’s assertions that it was unaware of VNXX when the ISP Amendment was signed is also incorrect. Nothing in the Pac-West/Qwest ICA is changed or clarified by the *Global NAPs* case.

3. *Global NAPs* Is Not Supported by Federal Law and is Nonbinding in Arizona.

On the merits, Pac-West does not agree that the First Circuit’s decision is consistent with the FCC *ISP Remand Order*. In the *ISP Remand Order*, the FCC unambiguously stated that *all* ISP-bound traffic is jurisdictionally interstate:

For jurisdictional purposes, the [FCC] views LEC-provided access to enhanced service providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers). . . . Accordingly, the

LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access.²

By definition, it lies within the sole province of the FCC to establish the appropriate level of compensation for interstate access, and thus this type of access cannot be subject to *intrastate* access charges. The First Circuit disagreed, reasoning that “A matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation.” *Global NAPs* at 24. That court ultimately concluded that the *ISP Remand Order* does not include a “clear indication” that the FCC intended to exercise jurisdiction over VNXX compensation to the exclusion of state regulation. This conclusion is inconsistent with the *ISP Remand Order*.

The FCC clearly manifested its intent to assert jurisdiction over ISP-bound traffic in the *ISP Remand Order*. The FCC found that “Most Internet-bound traffic traveling between a LEC’s subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis,” *Id.* ¶ 58, and added:

The “communication” taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases, or bulletin board contributors. Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists. **The proper focus for identifying a communication needs to be the user interacting with a desired webpage, friend, game, or chat room, not on an increasingly mystifying technical and mechanical activity in the middle that makes the communication possible.** ISPs, in most cases, provide services that permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified. *Id.* ¶ 59 (emphasis added).

² *ISP Remand Order*, ¶ 57 (emphasis in original).

The FCC thus unequivocally rejected the “two-call” theory on which the imposition of any access charges on locally-dialed ISP-bound calls would depend. *Id.* ¶ 62. The FCC even analogized ISP service to long-distance service, “not to prove that ISP service is identical to long distance service, but . . . merely to bolster, by analogy, the reasonableness of not characterizing an ISP as the destination of a call, but as a facilitator of communication.” *Id.* ¶ 60. Indeed, in distinguishing remarks made by its litigation counsel in another case, the FCC observed that the issues in that case “have no arguable bearing on whether the [ISP-bound] traffic is **one interstate call (as the [FCC] has always held)** or two separate calls (one of which allegedly is **intrastate**) as some parties have contended.” *Id.* ¶ 64 (emphasis added). Tellingly, the FCC differentiated between *interstate* and *intrastate* calls, not between interstate and *local* calls. Subjecting some locally dialed ISP-bound calls – which the FCC “has always held” are interstate – to intrastate access charges would be fundamentally inconsistent with the FCC’s rationale and conclusion in asserting jurisdiction over these calls. The FCC thus left no room whatsoever for a state commission to assert jurisdiction over a portion of an ISP-bound interstate call.³ The First Circuit decision overlooks the fact that there is no basis on

³ The First Circuit sought the FCC’s views on this issue and relied, in part, on statements made in the amicus brief filed by FCC Staff. That amicus brief is, by its own admission, of limited utility. The brief is not an order of the FCC and it candidly concedes that the FCC order it is interpreting “can be read to support the interpretation set forth by either party in this dispute.” (Amicus Brief at 13.) Also, the brief fails to mention that the FCC has, by order, addressed (and required) intercarrier compensation in the context of VNXX traffic. See *In re Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278, File No. EB-00-MD-19, Memorandum Opinion and Order (rel. Nov. 7, 2003).

which intrastate access charges could be imposed on interstate traffic, and thus is fatally flawed.

Qwest suggests that the First Circuit's decision in *Global NAPs* has the same nation-wide binding effect on the interpretation of the *ISP Remand Order* as the D.C. Circuit's opinion in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), which was the decision on direct review of the *ISP Remand Order*. (Qwest Exceptions at p. 5). Qwest cites no authority for this novel proposition and none exists. Certainly, state commissions – as well as federal and state courts – are bound by the decisions of the federal court of appeals that considers an FCC order *on direct review*, but neither the Hobbs Act nor any other federal law gives broad binding effect to the opinion of a federal appeals court that merely *interprets* an FCC order. *Global NAPs* is a federal appeals court opinion interpreting the FCC *ISP Remand Order*. Because *Global NAPs* is not an opinion issued on direct review, and because the District of Arizona is located within the United States Court of Appeals for the Ninth Circuit and not the United States Court of Appeals for the First Circuit, the Arizona Commission has no obligation to follow the First Circuit's opinion.

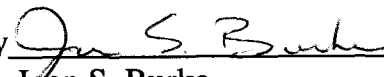
CONCLUSION

Global NAPs does not, as Qwest contends, resolve or even address whether Qwest is contractually bound to compensate Pac-West for ISP-bound traffic. The ICA between the parties answers that question. The ICA and its amendments have been carefully analyzed by both Arbitrator Antonuk and Judge Bjelland, and both decision makers reached the same conclusion. Pac-West submits that the ROO properly interprets the

ICA between Qwest and Pac-West to require Qwest to compensate Pac-West for the locally-dialed ISP-bound traffic that Qwest's customer and Qwest delivers to Pac-West for termination. Pac-West therefore respectfully requests that the Commission adopt the ROO as a final order.

Dated this 10th day of May, 2006.

OSBORN MALEDON PA

By 
Joan S. Burke
Daniel L. Kaplan
2929 North Central, Suite 2100
Phoenix, Arizona 85012
(602) 640-9356
E-mail: jburke@omlaw.com

Attorneys for Pac-West Telecomm, Inc.

ORIGINAL + 15 copies of the foregoing
filed this 10th day of May, 2006 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 21st day of April, 2006 to:

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Brian C. McNeil
Executive Director
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Jane L. Rodda
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
400 West Congress St.
Tucson, Arizona 85701

Amy Bjelland
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing electronically mailed
and sent via U.S. mail this 10th day of May,
2006 to:

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012
Attorneys for QWEST CORPORATION

Norman G. Curtright
Corporate Counsel
Qwest
4041 N. Central Avenue, 11th Floor
Phoenix, Arizona 85012

Brenda Wendt

1

4

ISSUED September 27, 2002

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1058

In the Matter of the Investigation into the)	CORRECTED
Use of Virtual NPA/NXX Calling Patterns)	PREHEARING CONFERENCE
)	REPORT

**DISPOSITION: PETITIONS TO INTERVENE GRANTED;
SCHEDULED ADOPTED.**

Background. On May 20, 2002, the Oregon Telecommunications Association (OTA) filed a Petition for a Declaratory Ruling under ORS 756.450. According to OTA, some competitive local exchange carriers (CLECs) have been obtaining blocks of telephone number, as part of a business plan which would enable those CLECs to provide long distance-like services without long distance charges and without payment of access charges to local exchange carriers (LECs). A docket was opened and designated as DR 31.

At its regular Public Meeting held on August 6, 2002, the Commission adopted the Staff Recommendation and appended it to its Order No. 02-542, which was entered August 8, 2002. The Order denied the petition for Declaratory Ruling and, instead, ordered a generic investigation of the subject matter of the Petition, which was identified as "virtual NPA/NXX (VNXX) calling patterns."

A notice was issued on September 9, 2002, scheduling a prehearing conference for the purposes of identifying parties and interested persons, establishing a service list, identifying issues and establishing a procedural schedule. On September 12, 2002, Time Warner Telecom of Oregon, LLC (T/W) and WorldCom, Inc. (WCOM) filed petitions to intervene in this proceeding.

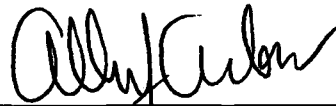
Discussion. A prehearing conference was held on September 25, 2002. Appearances were filed on behalf of the Oregon Telecommunications Association (OTA), 99 West, Inc. (99 West), Universal Telecom (U/T), Verizon, Inc. (Verizon), Sprint Corporation (Sprint), AT&T, Inc. (ATT), Qwest Corporation (Qwest), Level 3 Communications, LLC (Level 3), CenturyTel of Oregon, Inc. (CenturyTel), T/W, WCOM and the Commission staff (Staff). The Petitions to Intervene filed by T/W and WCOM were granted without objection. OTA, 99 West, U/T, Verizon, Sprint, AT&T, Qwest, Level 3 and CenturyTel also sought and were granted party status without objection.

The following schedule was adopted:

Parties exchange proposals on issues and technical presentations	October 28, 2002
Workshop	November 6, 2002
Hearing Conference on issues, scope and conduct of proceedings, if parties are not in agreement	If necessary, to be determined
Hearings	To be determined

DKr
9-27-02

Dated at Salem, Oregon, this 27th day of September, 2002.



Allen J. Arlow
Administrative Law Judge

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1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1058**

4
5 In the Matter of the Investigation into the Use of
6 Virtual NPA/NXX Calling Patterns

JOINT CLECs' COMMENTS ON
STAFF'S PROPOSED ISSUES LIST

7 Pursuant to the schedule issued in this case, Time Warner Telecom of Oregon LLC,
8 WorldCom, Inc., on behalf of its regulated subsidiaries operating in Oregon, Level 3
9 Communications, LLC, AT&T of the Pacific Northwest, Inc. and AT&T Local Services on
10 behalf of TCG Oregon, XO Oregon, Inc., PriorityOne Telecommunications, Inc., and Pac-West
11 Telecomm, Inc., (collectively, the "Joint CLECs") submit the following comments on Staff's
12 Proposed Issues List:

13 The Joint CLECs believe that Staff's proposed issues list is, for the most part,
14 satisfactory. However, the Joint CLECs do make the following suggestions for revisions:

15 A. Issues 6(a), (b) and (c) are duplicative of portions of Issues 5 and 7. For that
16 reason, the Joint CLECs suggest that Issues 5, 6, and 7 should be revised and
17 reordered as follows:

18 5. (a) What is the extent of the FCC's preemption of state commission authority
19 over traffic bound for internet service providers (ISPs)?

20 (b) How does this FCC preemption, to the extent it exists, relate to the offering of
21 VNXX service? *[Issues 5(a) and (b) are unchanged.]*

22 6. (a) What is the appropriate compensation mechanism for VNXX service?

23 (b) Is it appropriate to treat use of VNXX service for ISP-bound traffic differently
24 from the use of VNXX service for other traffic such as voice? *[Former*
25 *Issues 7(a) and (b) have been moved here].*

26 ///

1 7. Is there a practical or cost effective means of differentiating ISP-bound and voice
2 traffic? *[This is former Issue 6(d). Issues 6(a) through (c) have been deleted as*
3 *duplicative.]*

4 B. Issue 9 should be clarified and refined into two parts as follows:

5 9. (a) What, if any, is the impact of the Commission's decision in Order No. 83-869
6 on the issues in this case?

7 (b) Should the Commission reconsider its decision in Order No. 83-869?

8 C. Issue Nos. 11(b) and (c) are stated in a vague and ambiguous manner, and the
9 Joint CLECs cannot discern with certainty the issues raised by Staff. At any rate,
10 whatever the precise meaning of these questions, the Joint CLECs believe that
11 these questions are far outside the scope of this docket, as it has been discussed
12 to-date, and for that reason should not be included in the issues list.

13 DATED: May 10, 2006.

14 ATER WYNNE LLP

15
16 By _____
Lisa F. Rackner, OSB No. 87384

17
18 DAVIS WRIGHT TREMAINE LLP

19
20 By _____
Mark P. Trinchero, OSB No. 88322

CERTIFICATE OF SERVICE

UM 1058

I hereby certify that a true and correct copy of the **WORLDCOM, INC.'S PETITION**
TO INTERVENE was served via regular mail on the following parties on the date stated below:

MARY C. ALBERT
ALLEGIANCE TELECOM OF OREGON INC
1919 M ST NW STE 420
WASHINGTON DC 20036
mary.albert@algx.com

MARLIN D. ARD
LAW OFFICE OF MARLIN ARD
PO BOX 2190
SISTERS OR 97759
maratty@bendcable.com

R DALE DIXON
DAVIS DIXON KIRBY LLP
519 SW THIRD AVE STE 601
PORTLAND OR 97204
ddixon@davidixon.com

JACK FARLEY
99 WEST INC
4676 COMMERCIAL #41
SALEM OR 97302
jackf@99west.com

CHARLES FERRARI
DEPARTMENT OF JUSTICE
1162 COURT ST NE RM 100
SALEM OR 97310-0560
charles.ferrari@doj.state.or.us

RICHARD A FINNIGAN
LAW OFFICE OF RICHARD A FINNIGAN
2405 EVERGREEN PARK DR SW STE B-1
OLYMPIA WA 98502
rickfinn@yelmtel.com

1 GLENN R HARRIS
2 SPRINT/UNITED TELEPHONE CO OF THE NORTHWEST
3 902 WASCO ST
4 HOOD RIVER OR 97031
5 glenn.harris@mail.sprint.com

6 WILLIAM E HENDRICKS
7 SPRINT/UNITED TELEPHONE CO OF THE NORTHWEST
8 902 WASCO ST ORHDRA0412
9 HOOD RIVER OR 97031
10 tre.e.hendricks.iii@mail.sprint.com

11 REX KNOWLES
12 XO LONG DISTANCE SERVICES INC.
13 111 E BROADWAY STE 1000
14 SALT LAKE CITY UT 84111
15 rex.knowles@xo.com

16 JEFFREY MARTIN
17 UNIVERSAL TELECOM, INC.
18 1600 SW WESTERN BLVD STE 290
19 CORVALLIS OR 97333
20 martinj@uspops.com

21 KELLY MUTCH
22 PRIORITYONE TELECOMMUNICATIONS INC
23 PO BOX 1462
24 LA GRANDE OR 97850-6462
25 preseoni@eoni.com

26 ROGELIO E. PENA
PENA & ASSOCIATES LLC
1919 14TH ST STE 330
BOULDER CO 80302
repena@boulderattys.com

DEAN RANDALL
VERIZON NORTHWEST INC
PO BOX 1100
BEAVERTON OR 97075-1100
dean.randall@verizon.com

CALVIN K SIMSHAW
CENTURYTEL OF OREGON INC
805 BROADWAY
VANCOUVER WA 98660

1 calvin.simshaw@centurytel.com MICHEL SINGER-NELSON

2 WORLDCOM INC
3 707 - 17TH ST STE 4200
4 DENVER CO 80202
5 michel.singer_nelson@wcom.com

6 ETHAN SPRAGUE
7 PAC-WEST TELECOMM INC
8 1776 W MARCH LN STE 250
9 STOCKTON CA 95270

10 BRIAN THOMAS
11 TIME WARNER TELECOM OF OREGON LLC
12 223 TAYLOR AVE N
13 SEATTLE WA 98109-5017
14 brian.thomas@twtelecom.com

15 MARK P. TRINCHERO
16 DAVIS WRIGHT TREMAINE LLP
17 1300 SW FIFTH AVE STE 2300
18 PORTLAND OR 97201-5682
19 marktrinchero@dwt.com

20 RON L TRULLINGER
21 QWEST CORPORATION
22 421 SW OAK ST RM 810
23 PORTLAND OR 97204
24 rtrulli@qwest.com

25 RENEE WILLER
26 VERIZON NORTHWEST INC
PO BOX 1100
BEAVERTON OR 97076
renee.willer@verizon.com

RICHARD WOLTERS
AT&T LAW DEPARTMENT
1875 LAWRENCE ST STE 1500
DENVER CO 80202
rwolters@att.com

DATED this 4th day of December, 2002.

Donna L. Locke, Paralegal